

②
NO. 84-1667

Office-Supreme Court, U.S.

F I L E D

JUL 12 1985

ALEXANDER L. STEVENS,
CLERK

IN THE
Supreme Court of the United States

Bethel School District No. 403;
Christy B. Ingle; David C. Rich;
J. Bruce Alexander; and
Gerald E. Hosman,

Petitioners,

v.

Matthew N. Fraser, a Minor,
and E.L. Fraser, as his
Guardian Ad Litem,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief of Matthew N. Fraser, Respondent
Response to Petition for Certiorari

Simburg, Ketter, Haley,
Sheppard & Purdy
2525 First Interstate Center
Seattle, WA 98104
Telephone: (206) 382-2600

By: Jeffrey T. Haley
Counsel of Record

ABC Legal Printers, Seattle, Washington

BEST AVAILABLE COPY

INDEX

I.	QUESTIONS PRESENTED	1
	A. Main Question	1
	B. Subsidiary Questions	1
II.	RESPONDENT'S ADDITIONAL STATEMENT OF THE CASE	3
III.	ARGUMENT	10
	A. The result below is based upon seven reasons.	10
	B. The decisions below are not inconsistent with any published opinion of any federal court.	11
	C. The precedential value of the pub- lished opinion below is very narrow.	12
	D. On the central issue, the opinion below is clearly correct.	14
IV.	CONCLUSION	18



I. QUESTIONS PRESENTED

A. Main Question:

Based on the facts found by the district court and other evidence in the record, did the Ninth Circuit correctly conclude that there is a basis for affirming the result in the district court?

B. Subsidiary Questions:

(1) Is Fraser's speech protected by the First Amendment?

(2) Is the School District's Disruptive Conduct Rule unconstitutional on its face under the First Amendment?

(3) Did prohibiting Fraser from speaking at graduation as a form of punishment violate Fraser's rights to due process?

(4) Did the imposition of a short term suspension by the defendants violate state regulations and did the district court have authority to decide this issue?

(5) Is the School District's Disruptive Conduct Rule unconstitutional, vaguer, violating rights of due process?

(6) Did prohibiting Fraser from speaking at graduation as a form of punishment violate Fraser's rights under the First Amendment?

(7) Did punishing Fraser for giving a speech that was previewed by three teachers who did not direct him to refrain from giving it and did not suggest its delivery might violate school rules, even though they are charged with enforcement of school rules, violate Fraser's right to due process?

II. RESPONDENT'S ADDITIONAL STATEMENT OF THE CASE

To supplement the facts as stated by the Petitioners, the Respondents call the Court's attention to the following facts.

Fraser privately presented his speech to three different teachers, seeking their comments, before delivering his speech to the assembled students.

Complaint and Answer, ¶10 (Excerpt). None of the three either (1) directed Fraser to refrain from giving the speech, (2) suggested that it's delivery might violate school rules, or (3) alerted the administration that Fraser intended to give an improper speech. RT at 32, 51, 52, 68. Teachers at the school are requested to enforce school rules, RT at 34, and requested to take action to avert violations of school rules, RT at 108.

Approximately one year earlier, another student published an essay in the school's literary magazine which, through sexual double meanings, described in detail the sexual conquest of a female by a male, including sexual intercourse. A copy of this essay is attached to the Complaint as Exhibit A (Excerpt tab 1). This student was not suspended for publishing the essay and was a speaker at graduation. Complaint and Answer ¶22 (Excerpt).

At a similar political nominating assembly one year earlier, a student delivered a speech which contained a sexual innuendo and "four letter words". The student was only verbally reprimanded and was not suspended. RT at 52; Answer ¶23.

Because the student who gave a nominating speech with sexual innuendo and "four letter words" the year before was not punished, Fraser believed that the delivery of his speech would not subject him to discipline. RT at 52. A teacher who previewed Fraser's speech was not aware that there was a school rule regarding speeches of this sort. RT at 32. The school's assistant principal testified that school authorities do not expect lay people to know what constitutes disruptive behavior under the rule. RT at 93.

The assembly at which the speech was given was conducted by students for the purpose of presenting speeches for the election of student officials. Answer, ¶13; RT at 52, 132. The students were not required to attend the assembly and

were free to walk out at any time.

Findings 12 at 2 (Excerpt tab 7); RT at 38.

In Fraser's speech, the words and phrases which have sexual secondary meanings were chosen for the purpose of developing a rapport with the students to win the election for Fraser's candidate.

Findings 14 at 2 (Excerpt tab 7); RT at 47. The primary meanings of these words and phrases were chosen as metaphors to describe the political attributes of Fraser's candidate. RT at 48.

The student response to Fraser's speech was a mixture of strong approval, (clapping, hoots, hollering, "wonderful," "we are all for it," "great,") and quiet expression of non-understanding. RT at 28, 29. There is no evidence in the record that any students were offended by

the speech, were sexually excited by the speech, disapproved of it, or found it obscene.

After he delivered the speech, Fraser was warned that disciplinary action might result from his speech. Findings, ¶6. During the first class period the following morning, a school official informed him that the speech had a sexual meaning, that it was therefore obscene, and that this obscenity constituted a violation of the school's disruptive conduct rule. RT at 74-77. The official also presented letters from five teachers regarding the speech which constituted the basis for the charge. Three of the five letters were critical of the speech's content, expressing personal judgments that the speech was "inappropriate," "distasteful,"

"obscene," and contained "blatant sexual references." None of the letters suggested that the speech disrupted the assembly or caused other students to disrupt the assembly. Findings ¶8 at 3.

Before a student can appear on the ballot given to seniors to elect graduation speakers, the student must be approved by a panel of teachers and administrators. RT at 30, 59. The school administration gave particular scrutiny to Fraser's suitability as a graduation speaker, RT at 60, 61, 103, 104, and approved him as a speaker about three hours before Fraser gave the political speech to which school authorities objected. Findings ¶9 at 3 (Excerpt). Although his name was removed from the ballot for graduation speakers, Fraser won the election by write-in votes. RT at 80.

After Fraser was charged and punishment was imposed, a teacher found that students in her class were more interested in discussing the speech than attending to class work. The teacher then invited a class discussion of the speech. Findings, ¶5 (Excerpt tab 7). Before the Ninth Circuit, the Petitioners characterized this incident as a disruption of the educational process, Appellants' Br. at 4, which justifies the punishment previously imposed, Appellants' Br. at 20.

Applying the doctrine of **Miller** and **Ginsberg**, the trial court found that the speech was not obscene under the relevant community standards for high school students. RT at 114, 117, 118, 131; Findings of Fact and Conclusions of Law, ¶3 at 4.

III. ARGUMENT

This case does not merit review by the United States Supreme Court for the following reasons.

A. The result below is based upon seven reasons.

The Court must affirm the decisions below if the result is correct, even if the courts below relied on a wrong ground or gave a wrong reason.

The Ninth Circuit relied upon two separate grounds for affirming the result which are stated in Subsidiary Questions 1 and 2. In addition to these two grounds, the District Court also cited two additional grounds for reaching the result below. These are stated in Subsidiary Questions 3 and 4. One of them is based upon state law.

In addition to these four grounds, there are three additional grounds for affirming the result below which are stated in subsidiary questions 5, 6, and 7. If the Court is to overturn the result below, it must consider and overrule the four grounds relied upon by lower courts. In addition, it must consider the three additional grounds which were not ruled upon below and decide them against the respondent.

B. The decisions below are not inconsistent with any published opinion of any federal court.

The central issue of the decisions below concerns the power of school officials to punish high school students who use sexual innuendo, without obscenity or offensive words, in speeches concerning student politics. Neither the

petitioners nor the dissenting judge in the Ninth Circuit have cited any cases from any federal court which differs from the Ninth Circuit's decision on this issue.

C. The precedential value of the published opinion below is very narrow.

The Ninth Circuit opinion decided three issues. Petition, A-9-10. The first issue was whether the speech caused a material disruption to the educational process. Based on the facts of the case, the Ninth Circuit concluded that it did not. Petition A - 21. This conclusion was based upon the facts and has little precedential importance.

The second issue was whether the Ninth Circuit should recognize a new exception to the First Amendment for the use of non-obscene sexual innuendo in

schools by high school students. The Petitioners urged that this exception should be based upon an extension of **Federal Communications Commission v. Pacifica Foundation**, 438 U.S. 726 (1978). Petition A - 24. Considering that the speech in question was a political speech, the Ninth Circuit declined the invitation to create new law in this case. Petition A - 30, A - 32. Although this opinion will require district courts within the Ninth Circuit to protect the use of non-obscene sexual innuendo without offensive words in political speeches by high school students, it is not binding upon the rest of the district courts or the Courts of Appeals. Within the Ninth Circuit, the precedential value will be very narrow because it will only apply to non-obscene

political speeches without offensive words.

The third issue decided by the Ninth Circuit is whether the forum for the speech was a school function which allows the school to regulate the content of speeches presented. Based upon the facts of the case, the Ninth Circuit concluded that the assembly was clearly an extra-curricular activity and not part of the school curriculum. Petition A - 38. Again, the precedential value of this conclusion is limited to cases involving high school student politics.

D. On the central issue, the opinion below is clearly correct.

The central issue in this case is whether school officials can prohibit speech by high school students at student run political assemblies which uses

sexual innuendo but which is not obscene and does not use any offensive language. The district court and the Ninth Circuit have ruled that they cannot. As stated by the Ninth Circuit, the opposite answer would be fraught with grave danger because it is impossible to articulate clear standards for distinguishing such speech which is protected by the First Amendment from speech which is not.

Petition A - 30.

The petitioners argue that school officials should be permitted to prohibit in the schools any form or style of speech that they deem inappropriate, as long as they are not actually motivated by a desire to suppress the expression of ideas. Petition at 19. Such an approach would turn existing principles of First Amendment doctrine on their heads. The

form and style selected by a speaker are frequently essential ingredients of the message to be communicated.

In the case before the court, the sexual innuendo used by Fraser was an essential ingredient in his message. The common ground of student politics is that the administration is the adversary.

Fraser wished to demonstrate to the students that, like his candidate, he had the political guts to stand up before the administration and deliver a speech which the students would find witty but the administration would find inappropriate. The evidence suggests that the message was successful because Fraser's candidate won the election.

School authorities do not need the power to punish students for using sexual innuendo in student politics. The

mission of our schools is to educate rather than to control. If a local community views the use of sexual innuendo as distasteful or inappropriate in certain situations, school authorities can teach the students this view. Arguably, school authorities have a duty to teach about such views of the community.

However, school authorities should not coerce students to follow to this view. The school experience should teach principles of the First Amendment by example. Students should be taught that speech which is disapproved of by the community may cause social, political, or business repercussions. If the authorities do their job, the students will learn that there are reasons to use acceptable forms of speech, other than

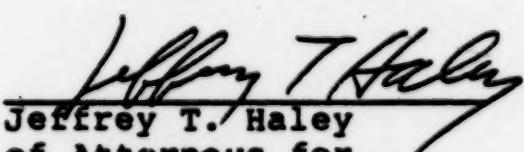
avoiding punishment by school authorities. But, as in our society outside schools, students must be free to use all forms of expression protected by the First Amendment without fear of punishment by governing authorities.

IV. CONCLUSION

The Court should deny the Petition for Certiorari and allow the decision of the Ninth Circuit to stand without review.

Respectfully submitted,

**SIMBURG, KETTER, HALEY,
SHEPPARD & PURDY**


Jeffrey T. Haley
Jeffrey T. Haley
of Attorneys for
Respondents